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1871a

Enforcement of the Fourteenth Amendment.

SPEECH

OF

HON. JAMES A. GARFIELD,

OF OHIO,

DELIVERED

IN THE HOUSE OF REPRESENTATIVES,

APRIL 4, 1871.

"SEC. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or happiness without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."—*Constitution*, Art. XIV.

WASHINGTON:
F. & J. RIVES & GEO. A. BAILEY,
REPORTERS AND PRINTERS OF THE DEBATES OF CONGRESS.
1871.

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The House having under consideration the bill (H. R. No. 320) to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes—

Mr. GARFIELD, of Ohio, said:

Mr. SPEAKER: I am not able to understand the mental organization of the man who can consider this bill, and the subject of which it treats, as free from very great difficulties. He must be a man of very moderate abilities, whose ignorance is bliss, or a man of transcendent genius whom no difficulties can daunt and whose clear vision no cloud can obscure.

The distinguished gentleman [Mr. SHELLABARGER] who introduced the bill from the committee very appropriately said that it requires us to enter upon unexplored territory. That territory, Mr. Speaker, is the neutral ground of all political philosophy; the neutral ground for which rival theories have been struggling in all ages. There are two ideas so utterly antagonistic that when, in any nation, either has gained absolute and complete possession of that neutral ground, the ruin of that nation has invariably followed. The one is that despotism which swallows and absorbs all power in a single central, government; the other is that extreme doctrine of local sovereignty which makes nationality impossible and resolves a general government into anarchy and chaos. It makes but little difference as to the final result which of these ideas drives the other from the field; in either case, ruin follows.

The result exhibited by the one, was seen in the Amphictyonic and Achæan leagues of ancient Greece, of which Madison, in the twentieth number of the Federalist, says:

"The inevitable result of all was imbecility in the government, discord among the provinces, foreign influences and indignities, a precarious existence in peace and peculiar calamities in war."

This is a fitting description of all nations who have carried the doctrine of local self-government so far as to exclude the doctrine of nationality. They were not nations, but mere leagues bound together by common consent, ready to fall to pieces at the demand of any refractory member. The opposing idea was never better illustrated than when Louis XIV entered the French Assembly, booted and spurred, and girded with the sword of ancestral kings, and said to the deputies of France, "The State! I am the State!"

Between these opposite and extreme theories of government, the people have been tossed from century to century; and it has been only when these ideas have been in reasonable equipoise, when this neutral ground has been held in joint occupancy, and usurped by neither, that popular liberty and national life have been possible. How many striking illustrations of this do we see in the history of France! The despotism of Louis XIV, followed by reign of terror, when liberty had run mad and France was a vast scene of blood and ruin! We see it again in our day. Only a few years ago the theory of personal government had placed into the hands of Napoleon III absolute and irresponsible power. The communes of France were crushed, and local liberty existed no longer. Then followed Sedan and the rest. On the 1st day of last month, when France was trying to rebuild her ruined Government, when the Prussian cannon had scarcely ceased thundering against the walls of Paris, a deputy of France rose in the National Assembly and moved as the first step toward the safety of his country, that a committee of thirty should be chosen, to be called the Committee of Decentralization. But it was too late to save France from the fearful reaction from despotism. The news comes to us, under the sea, that on Saturday last the cry was ringing through France, "Death to the priests, and death to the rich!" and the swords of the citizens of that new republic are now wet with each other's blood.

EQUIPOISE OF OUR GOVERNMENT.

The records of time show no nobler or wiser work done by human hands than that

of our fathers when they framed this Republic. Beginning in a wilderness world, they wrought unfettered by precedent, untrammeled by custom, unawed by kings or dynasties. With the history of other nations before them, they surveyed the new field. In the progress of their work they encountered these antagonistic ideas to which I have referred. They attempted to trace through that neutral ground the boundary line across which neither force should pass. The result of their labors is our Constitution and frame of government. I never contemplate the result without feeling that there was more than mortal wisdom in the men who produced it. It has seemed to me that they borrowed their thought from Him who constructed the universe and put it in motion. For nothing more aptly describes the character of our Republic than the solar system, launched into space by the hand of the Creator, where the central sun is the great power around which revolve all the planets in their appointed orbits. But while the sun holds in the grasp of its attractive power the whole system, and imparts its light and heat to all, yet each individual planet is under the sway of laws peculiar to itself.

Under the sway of terrestrial laws, winds blow, waters flow, and all the tenantries of the planet live and move. So, sir, the States move on in their orbits of duty and obedience, bound to the central Government by this Constitution, which is their supreme law; while each State is making laws and regulations of its own, developing its own energies, maintaining its own industries, managing its local affairs in its own way, subject only to the supreme but beneficent control of the Union. When State rights run mad, put on the form of secession, and attempted to drag the States out of the Union, we saw the grand lesson taught, in all the battles of the late war, that a State could no more be hurled from the Union without ruin to the nation, than could a planet be thrown from its orbit without dragging after it, to chaos and ruin, the whole solar universe.

Sir, the great war for the Union has vindicated the centripetal power of the nation, and has exploded, forever I trust, the disorganizing theory of State sovereignty which slavery attempted to impose upon this country. But we should never forget that there is danger in the opposite direction. The destruction or serious crippling of the principle of local government would be as fatal to liberty as secession would have been fatal to the Union.

The first experiment which our fathers tried in government-making after the War of Independence was a failure, because the central power conferred in the Articles of Confederation was not strong enough. The second, though nobly conceived, became almost a failure because slavery attempted so to interpret the Constitution as to reduce the nation again to a confederacy, a mere league between sovereign States. But we have now vindicated and secured the centripetal power; let us see that the centrifugal force is not destroyed, but that the grand and beautiful equipoise may be maintained.

LOCAL SELF-GOVERNMENT.

No more beautiful thought was embodied in the structure of our Republic than this: that our fathers did so distribute the powers of government that no one power should be able to swallow, absorb, or destroy the others. In this distribution, it is provided that many, indeed most of the functions of government, shall be exercised immediately under the eyes of the people themselves. Let me illustrate this by the system of taxation in my own State. I have here a statement of the taxation of the State of Ohio for the last year. There were raised in 1870, under State laws, nearly twenty-four millions of dollars. Less than five millions of the twenty-four found their way to the State Treasury at Columbus. Less than four millions, indeed, were used for central purposes. Nineteen of the twenty-four millions were levied within the townships and the counties, under the direction of township trustees, city and county officers; and, in accordance with the general laws of the State, these sums were expended at home, under the direction of the very men who specially consented that the tax should be levied. Twelve and a half millions were raised and expended in the townships.

Mr. Speaker, how often have you heard of embezzlement or defalcation by township officers; though, as in Ohio, more than half of all the taxes raised are kept in the treasuries of the townships? Where in the the nation is there so wise and so honest an administration of affairs as in the townships, under the eye of the people who have approved the levy, and who watch the expenditure of the money? We have sometimes heard of defalcations of county treasurers, because they live some distance away from the Argus-eyes which watch over their proceedings. We have oftener heard of State defalcations, because State officers are still further away. And oftener still we hear of national defalcations, where the power is exercised still further away from the people who grant it. I mention this as an illustration of the character of our Government.

The illustration might be extended with equal force to the administration of justice in townships and counties, where offenses against persons and property are tried before judges of the people's own choosing, and before jurors who are the neighbors of the parties, and who can administer justice far better than is possible at distant and remote points, where both court and jury are strangers to the parties.

But I turn from these general remarks to the consideration of those features of our

Constitution which relate more immediately to the subject of the bill now before the House.

PROTECTION OF PERSONS AND PROPERTY BEFORE THE LATE AMENDMENTS.

I presume it will not be denied, that before the adoption of the last three amendments it was the settled interpretation of the Constitution that the protection of the life and property of private citizens within the States belonged to the State governments exclusively. I will, however, fortify this position by a few authorities which will not be questioned. Mr. Madison says, in the forty fifth number of the Federalist:

"The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

In the celebrated case of Cohens *vs.* Virginia (6 Wheaton, page 424) the Supreme Court takes the same ground: and Mr. Story, in his Commentaries on the Constitution, section twelve hundred and twenty six, quotes with approval the following passage from that opinion of the court:

"Congress has a right to punish murder in a fort or other place within its exclusive jurisdiction, but has no general right to punish murder committed within any of the States."

In February, 1866, while debating a proposed amendment to the Constitution, which in its final form became the fourteenth article, my colleague [Mr. BINGHAM] quoted the passage from the Federalist which I have already quoted, and then said:

"These words of Madison are very significant. The fact is that Congress has never, by official enactment in all the past, attempted to enforce these rights of the people in any State of the Union."—*Globe*, Thirty-Ninth Congress, page 1093.

In the same debate he also said:

"We have not now the power, in time of peace, to enforce the citizen's right to life, liberty, and property within the limits of South Carolina, after her State government shall be recognized and her constitutional relations restored."

On the 9th of March, 1866, when the civil rights bill was under debate, Mr. BINGHAM also said:

"The Constitution does not delegate to the United States a power to punish offenses against the life, liberty, and property of citizens in the States; nor does it prohibit that power to the States, but leaves it as the reserved right of the States, to be by them exercised."—*Globe*, page 1291.

And again, in the same speech:

"I have always believed that protection in time of peace within the States of all rights of persons and citizens was of the powers reserved to the States, and so I still believe."—*Globe*, page 1293.

While the first section of the civil rights bill was under debate my colleague [Mr. SHELLABARGER] said:

"If this section did in fact assume to confer or define or regulate these civil rights which are named by the words contract, sue, testify, inherit, &c., then it would, as seems to me, be an assumption of the reserved rights of the States and of the people."—*Globe*, page 1293.

"The bill does not reach mere private wrongs, but only those done under color of State authority, and that authority must be extended on account of race or color. It is meant, therefore, not to usurp the powers of the States to punish offenses generally against the rights of citizens in the several States, but its whole force is expended in defeating an attempt, under State laws, to deprive races and the members thereof, as such, of the rights enumerated in this act. This is the whole of it."—*Globe*, page 1294.

In the same debate Mr. Delano, of Ohio, now Secretary of the Interior, speaking of the Constitution said:

"It was never designed to take away from the States the right of controlling their citizens in respect to property, liberty, and life. If we now go on in a system of legislation based upon the assumption that Congress possesses the right of supreme control in this respect, I submit whether we are not assisting to build up a consolidated Government in view of the powers of which we may well tremble."—*Appendix*, page 158.

Authorities might be cited to a much greater length. They all concur in the statement with which I set out, that the power to protect the life and property of private citizens within the States, was left by the Constitution exclusively to the State governments.

PROTECTION OF PERSONS AND PROPERTY UNDER THE LATE AMENDMENTS.

Now, three amendments, the thirteenth, fourteenth, and fifteenth, have been added to the Constitution, and it will not be denied that each of these amendments has so modified the Constitution as to change the relation of Congress to the citizens of the States. They have to some extent enlarged the functions of Congress, and, within prescribed limits, have extended its jurisdiction within the States.

I now inquire how far this jurisdiction has been extended. The thirteenth amendment provides that slavery shall never exist within the United States, or any place subject to their jurisdiction, and Congress is empowered to enforce this provision on every inch of soil covered by our flag. Congress may by its legislation prevent any person from being made a slave by any law, usage, or custom, or by any act direct or indirect. This, I presume, will not be denied; and Congress has effectually carried out this provision.

In the fifteenth amendment, the last of the three, the rights of citizens of the United States to vote shall not be denied or abridged, either by the United States or by any State, in consequence of race, color, or previous condition of servitude. And that, taken in connection with the clause in the main text of the Constitution, which authorizes Congress to regulate the time, place, and manner of holding elections, arms Congress with the full power to protect the ballot-box at all elections, at least of officers of the United States,

and to protect the right of all men within the limit of that clause to the suffrage. On this point, I presume, there will be no difference of opinion, at least on this side of the House. In pursuance of this power we passed the act of May 31, 1870, and the amendatory act of February 28, 1871.

FIRST SECTION OF THE FOURTEENTH AMENDMENT.

I now come to consider last in order, for it is the basis of the pending bill, the fourteenth amendment. I ask the attention of the House to the first section of that amendment, as to its scope and meaning. I hope gentlemen will bear in mind that this debate, in which so many have taken part, will become historical, as the earliest legislative construction given to this clause of the amendment. Not only the words which we put into the law, but what shall be said here in the way of defining and interpreting the meaning of the clause, may go far to settle its interpretation and its value to the country hereafter.

No thorough discussion of this clause is possible which does not include a history of some of the leading facts connected with its origin and its adoption by Congress. I will therefore state briefly the proceedings of this House on the first form of amendment proposed on the subject embraced in the first section of the fourteenth amendment, as it now stands in the Constitution.

THE REJECTED AMENDMENT.

On the 13th February, 1866, Mr. BINGHAM reported, from the joint Committee on Reconstruction, a joint resolution proposing the following amendment to the Constitution of the United States:

"ARTICLE —. The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all the privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty, and property."

The debate proceeded at great length, and the necessity for increased protection to those who had lately been slaves, against the hostile legislation of the States, was strongly urged. I will quote a few paragraphs from the debate, to show some of the leading reasons that were urged for and against the proposition.

Mr. Higby, of California, insisted that this amendment was necessary in order to protect the lives and property of the citizens in the South. He showed how, under the thirteenth amendment, the laws of the States might be so administered as to put black men into slavery under pretense of sentencing them for crime, and that without additional power given to Congress the General Government could not prevent such a result. (Globe, February 27, page 1056.)

Others urged the amendment on the same and similar grounds.

Mr. HALE, of New York, opposed the amendment. He said that under it—

"All State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overriden, may be repealed, and abolished, and the law of Congress established instead. I maintain that in this respect it is an utter departure from every prineiple ever dreamed of by the men who framed our Constitution."—*Globe*, page 1063.

On the 28th of February my colleague [Mr. BINGHAM] made a very able and elaborate speech in defense of the amendment. He based its necessity on the fact that Congress had then no power to legislate for life, liberty, and property within the States. He affirmed, also, that the guarantees of the rights of property and person named in the fifth article of amendments to the Constitution were not limitations on the State governments, but only on Congress. To support this position he quoted the case of Barron *vs.* The Mayor and City Council of Baltimore, (7 Peters, page 247;) also, Lessee of Livingston *vs.* Moore, (7 Peters, page 251;) also, 3 Webster, page 471; and then said, (Globe, page 1090:)

"The question is simply whether you will give by this amendment, to the people of the United States, the power, by legislative enactment, to punish officials of States for violation of the oaths enjoined upon them by their Constitution."

In the course of Mr. BINGHAM'S speech, Judge Hale, of New York, asked him—

"Whether, in his opinion, this proposed amendment to the Constitution does not confer upon Congress a general power of legislation for the purpose of securing to all persons in the several States protection of life, liberty, and property, subject only to the qualification that that protection shall be equal."

"Mr. BINGHAM. I believe it does in regard to life, liberty, and property, as I have heretofore stated it, the right to real estate being dependent on the State law, except when granted by the United States.

"Mr. HALE. I desire to know if he means to imply that it extends to personal estate.

"Mr. BINGHAM. Undoubtedly it is true."

Mr. CONKLING, now a Senator from the State of New York, during the same debate said of this amendment:

"It was introduced several weeks ago, and considered in a committee of fifteen. At that time and always I felt constrained to withhold from it my support as one of the committee, and when the consent of the committee was given to its being reported I did not concur in the report."—*Globe*, page 1094.

Mr. HOTCHKISS, of New York, said:

"I understand the amendment, as now proposed by its terms, to authorize Congress to establish uniform laws throughout the United States upon the subject named, the protection of life, liberty, and property. I am unwilling that Congress shall have any such power."

I have been thus particular in reviewing the history of this debate, in order to show the sentiment that then prevailed in this House in regard to one of the theories which we are asked to adopt in this debate.

Now, let it be remembered that the proposed

amendment was a plain, unambiguous proposition to empower Congress to legislate directly upon the citizens of all the States in regard to their rights of life, liberty, and property. Mark the action of the House. After a debate of two weeks, the record of which covers more than one hundred and fifty columns of the Globe, and in which the proposed amendment was subjected to a most searching examination, it became evident that many leading Republicans of this House would not consent to so radical a change in the Constitution, and the bill was recommitted to the joint select committee.

Mr. BINGHAM. The gentleman is mistaken. A motion was made to lay that amendment on the table. There were 41 votes in favor of the motion and 110 against it. I voted myself in favor of a postponement; but the measure was not recommitted, for I was a member of the committee and knew what it could do.

Mr. GARFIELD, of Ohio. My colleague is technically right in saying that the measure was postponed. Of course the majority did not allow it to be laid on the table on motion of a member of the opposite party, and the motion was voted down, as my colleague has said. But the consideration of the measure was postponed on motion of Mr. CONKLING, who had opposed it from the start, and it did in fact go back to the committee, and was never again discussed in this House. What is more, it was never debated at all in the Senate, though it was introduced into that body by Mr. Fessenden the same day that Mr. BINGHAM introduced it into the House. The whole history of the case shows that it became perfectly evident, both to the members of the Senate and of the House, after the House debate, that the measure could not command a two-thirds vote of Congress, and for that reason the proposition was virtually withdrawn. Its consideration was postponed February 28 by a vote of 110 to 37.

THE AMENDMENT AS ADOPTED.

More than a month passed after this postponement, or recommittal, without further action in either House. On the 30th April, 1866, the fourteenth amendment was introduced into the House, and the first section was precisely as it now stands in the Constitution, except that the first sentence of the present text was not in the draft. The new form of amendment was also debated at great length. The gentleman who reported it from the committee, the late Mr. Stevens, of Pennsylvania, said that it came far short of what he wished, but after full consideration, he believed it the most that could be obtained.

Mr. BINGHAM. My colleague will allow me to correct him again. The remark of Mr. Stevens had no relation whatever to that provision, none at all. That is all I have to say on that point now.

Mr. GARFIELD, of Ohio. My colleague can make but he cannot unmake history. I not only heard the whole debate at the time, but I have lately read over, with scrupulous care, every word of it as recorded in the Globe. I will show my colleague that Mr. Stevens did speak specially of this very section.

The debate on this new proposition, which afterward became the fourteenth amendment, was opened by Mr. Stevens, May 8th, in a characteristic and powerful speech. He spoke of the difficulties which the joint committee on reconstruction had encountered, and of the long struggle they had had to reach any proposition on which the friends of the amendment could unite. He said:

"The proposition is not all that the committee desired. It falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion." * * * *

"The first section prohibits the States from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, and property, or of denying to any person within their jurisdiction the 'equal' protection of the laws.

"I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or other, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes. Now different degrees of punishment are inflicted, not on account of the magnitude of the crime, but according to the color of the skin. Now color disqualifies a man from testifying in the courts or being tried in the same way as white men. I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them, those States will all, I fear, keep up this discrimination and crush to death the hated freedmen."—*Globe*, page 2459.

In the long debate which followed this section of the amendment was considered as equivalent to the first section of the civil rights bill, except that a new power was added in the clause which prohibited any State from depriving any person within its jurisdiction of the equal protection of the laws. The interpretation of this first section, as given by Mr. Stevens, was the one followed by almost every Republican who spoke on the measure. It was throughout the debate, with scarcely an exception, spoken of as a limitation of the power of the States to legislate unequally for the protection of life and property. On the 9th of May Mr. Eliot, of Massachusetts, said:

"I support the first section because the doctrine it declares is right, and if under the Constitution as it

now stands Congress has not the power to prohibit State legislation discriminating against any classes of citizens or depriving any persons of life, liberty, and property without due process of law, or denying to any persons within the State the equal protection of the laws, then, in my judgment, such power should be distinctly conferred."—*Page* 2511.

Mr. FARNSWORTH approved the amendment but said that the first section might as well be reduced to these words: "No State shall deny to any person within its jurisdiction the equal protection of the laws," for that was the only provision in it which was not already in the Constitution. (Page 2539.)

It is noticeable also that no member of the Republican party made any objection to this section on the grounds on which so many had opposed the former resolution of amendment; but many expressed their regret that the article was not sufficiently strong.

Mr. Shanklin, of Kentucky, a Democrat, said:

"The first section of this proposed amendment to the Constitution is to strike down the reserved rights of the States and invest all the power in the Federal Government."—*Page* 2500.

Mr. Rogers, of New Jersey, a Democrat, took similar ground. (Page 2538.)

These are the only declarations I find in the House debates, either by Democrats or Republicans, indicating that this clause was regarded as placing the protection of the fundamental rights of life and property directly in the control of Congress; and these declarations of Shankling and Rogers were general and sweeping charges, not sustained even by specific statement.

I close this citation of speeches on the amendment by quoting the view taken of the scope and meaning of this first section by my colleague, [Mr. BINGHAM.] He said:

"This section gives power to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by unconstitutional acts of any State.

"Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws, or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy."—*Page* 2542.

After a debate on this new proposition which lasted several days and evenings, the amendment passed the House May 10, 1866, by a vote of 128 ayes to 37 noes, not one Republican voting against it. It will not be denied, as a matter of history, that this form of amendment received many Republican votes that the first form to which I have referred could not have received. In the Senate there was but little debate on the first section and no change was made in it, except that, on the motion of Mr. Howard, of Michigan, these words were added at the beginning of the section:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside."

Other changes were made by the Senate in other sections of the amendment, and the whole, as amended, passed June 8, by a vote of 33 to 11.

On the 13th of June the House passed the article, with the Senate amendments, by a vote of 120 to 32, every Republican present voting for it.

THE REJECTED AND THE ADOPTED AMENDMENTS COMPARED.

With this review of the history of the clause rejected and that adopted in our minds, I ask gentlemen to consider the difference between the two. Putting the fifth clause of the amendment first, and, to make the comparison closer, omitting the definition of citizenship, the section as adopted reads thus:

"The Congress shall have power to enforce, by appropriate legislation, the following provisions"—

To wit:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And this is the rejected clause:

"The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all the privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."

The one exerts its force directly upon the States, laying restrictions and limitations upon their power and enabling Congress to enforce these limitations. The other, the rejected proposition, would have brought the power of Congress to bear directly upon the citizens, and contained a clear grant of power to Congress to legislate directly for the protection of life, liberty, and property within the States. The first limited but did not oust the jurisdiction of the State over these subjects. The second gave Congress plenary power to cover the whole subject with its jurisdiction, and, as it seems to me, to the exclusion of the State authorities.

Mr. Speaker, unless we ignore both the history and the language of these clauses we cannot, by any reasonable interpretation, give to the section, as it stands in the Constitution, the force and effect of the rejected clause.

POWERS GRANTED IN THE FIRST SECTION.

Mr. Speaker, I now inquire to what extent this section does enlarge the powers of Congress. On the proper answer to this inquiry

will chiefly rest our power of legislation on the subject before us. The first sentence of the section defines

CITIZENSHIP.

It declares that—

"All persons born and naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside."

On this threshold of the section, we find a conflict of opinion. In his very able speech, my colleague [Mr. SHELLABARGER] has given us his interpretation of this first sentence. He says:

"The United States added to its Constitution what was not in it before; because never before was it found in the Constitution in express words that all people in this country were citizens of the United States as well as of the States. This was added, and added for a purpose."

He also says:

"The making of them United States citizens and authorizing Congress by appropriate law to protect that citizenship gave Congress power to legislate directly for enforcement of such rights as are fundamental elements of citizenship.

"This, sir, is the foundation idea on which this section and the whole bill rest for their constitutional warrant. If right, it solves every possible doubt and difficulty in every part of this great inquiry."

Now, Mr. Speaker, I desire to call the attention to this statement, that in putting into the Constitution a definition of citizenship there was given to Congress a great power which did not before exist in the Constitution. Can my colleague by any possibility forget that provision of the Constitution which declares that "no person shall be a Representative who shall not have been seven years"—what? "A citizen of the United States." Can he forget that other clause which declares that "no person shall be a Senator of the United States who shall not have been nine years a citizen of the United States?" Can he forget that in article two, section one, it is declared that "no person except a natural-born citizen, or a citizen of the United States at the adoption of the Constitution, shall be eligible to the office of President?" Were there no citizens of the United States until the fourteenth amendment passed? Was my colleague any less a citizen of the United States when he sat in the Thirty-Ninth Congress than he is to-day? Sir, the citizens of the United States made this Constitution. It was not the Constitution that made us citizens. The people who ordained and established the Constitution were citizens when they made that instrument.

I know my colleague limits his statement by saying that the Constitution did not before say, "in express words, that all the people in this country were citizens of the United States;" but I ask him and all who hear me to say whether this was not as true before the adoption of the fourteenth amendment as it is to-day. The only doubt I ever heard expressed on this point was whether slaves became citizens of the United States by the act of emancipation. If they did, the proposition was wholly true, before as well as after the adoption of the amendment.

I hold in my hand Paschal's annotated edition of the Constitution, four pages and a half of which are filled with references to decisions of the courts, from the beginning of the century until now, declaring in the plainest terms that all free persons, born or naturalized in the United States, are citizens thereof. A weak attempt was made in the Dred Scott case to exclude free colored persons from the rights of citizenship, but that feature of the opinion was in opposition to the main body of previous precedents and to all subsequent decisions. I will quote but one or two of the many declarations of our constitutional teachers. Chancellor Kent says:

"Citizens, under our Constitution and laws, mean free inhabitants born within the United States or naturalized under the laws of Congress."

* * * * * * *

"If a slave born in the United States be manumitted or otherwise lawfully discharged from bondage, or if a black man born in the United States becomes free he becomes thenceforward a citizen, but under such disabilities as the laws of the several States may deem it expedient to prescribe to persons of color."—*Ibid*, 1; *Kent's Commentaries*, 292, note.

In the admirable opinion of Attorney General Bates, delivered to President Lincoln, November 29, 1862, this whole subject is thoroughly discussed. He says:

"The Constitution does not make the citizen; it is, in fact, made by them. Every person born in the country is, at the moment of birth, *prima facie*, a citizen."

We have recognized this principle of citizenship in all our naturalization laws. We transform the subjects of foreign Governments into citizens of the United States whenever they comply with the terms of our naturalization laws. The civil rights bill broadly and fully affirms the doctrine I am here contending for.

I remember the able speech of my colleague [Mr. SHELLABARGER] in favor of the civil rights bill, in the spring of 1866, before this fourteenth amendment had been adopted. The first sentence of that law is in these words:

"*Be it enacted, &c.*, That all persons born in the United States, and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens."

My colleague and I then believed, as I now believe, that we were fully empowered to make this declaration of citizenship, and so the Republicans in this House and in the Senate believed.

I do not by any means underrate the value and importance of the first sentence of the amendment. It set at rest forever a vexed and troublesome question. It brushed away all the legal subtleties and absurdities that were based on the supposed difference between citi-

zenship of the United States and citizenship of the States; and by declaring that every person born on the soil and subject to the jurisdiction of the United States is a citizen both of the nation and of the State wherein he resides. It lifted into undoubted citizenship those who had been slaves, and thus resolved all doubts as to their civil condition. It is clear to my mind that this had already been done by the provisions of the civil rights bill.

It was held by Mr. Justice Swayne, in his learned opinion on the case of Rhodes *vs.* The United States, that the civil rights bill naturalized all negroes born in this country who had been slaves, made them citizens, and gave them all the rights, privileges, and immunities to which white men were entitled under the laws. The rights of the white citizens were made the standard to which all others were lifted. But neither the civil rights bill nor the first sentence of the fourteenth amendment added to the rights already guarantied to the white citizen by the Constitution.

If the view I have taken of citizenship be correct, it follows that my colleague is in error when he attempts to find in the first sentence of this first section, the power to protect by congressional enactment, all the fundamental rights of persons and property within the States—a power which had theretofore, without question, belonged exclusively to to the State governments. If my colleague's reasoning on this point be valid, I do not see how he can stop short of ousting completely the jurisdiction of the States over these subjects. He makes the clause go to the full extent of the one which was rejected.

I shall not be able in the hour assigned me to discuss with thoroughness all the paragraphs of this section, but I will notice them briefly.

PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES.

The next clause is this:

"No State shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States."

The substance of this provision is in the main text of the Constitution, and has again and again been interpreted by the courts.

Mr. BINGHAM. The gentleman will please excuse me if I interrupt him.

Mr. GARFIELD, of Ohio. My time is more than half expired, and I hope my colleague will not unnecessarily consume it.

Mr. BINGHAM. The first, in the first section of the fourteenth article of amendment, to wit, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," never were in the original text of the Constitution. The original text of the Constitution reads that the citizens of each State shall be entitled to the privileges and immunities of citizens of the several States; which were always interpreted, even by Judge Story, from whom the gentleman cited in the outset, to mean only privileges and immunities of citizens of the States, not of the United States.

Mr. GARFIELD, of Ohio. I have made no statement which requires this criticism of my colleague. It is true that the main text of the Constitution which he quotes speaks of State citizenship; but as all persons free born or naturalized were citizens of the United States, it brings us to the same result as though national citizenship had been expressed in the section quoted. Indeed, the Supreme Court declared, forty years ago, that "a citizen of the United States residing in any State of the Union is a citizen of that State." (Gassies *vs.* Ballon, 6 Peters, 761.)

My colleague, [Mr. SHELLABARGER,] and also the gentleman from Massachusetts, [Mr. HOAR,] have given a breadth of interpretation to the force of these words "privileges" and "immunities" which, in my judgment, are not warranted, and which go far beyond the intent and meaning of those who framed and those who amended the Constitution. The gentleman from Massachusetts said in his speech:

"Congress is empowered by the fourteenth amendment to pass all 'appropriate legislation' to secure the privileges and immunities of the citizen. Now, what is comprehended in this term 'privileges and immunities?' Most clearly it comprehends all the privileges and immunities declared to belong to the citizen by the Constitution itself. Most clearly, also, it seems to me, it comprehends those privileges and immunities which all republican writers of authority agree in declaring fundamental and essential to citizenship."

He then quotes from Judge Washington's opinion in the case of Corfield *vs.* Coryell a statement that the fundamental rights of citizenship "are protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety."

Now, sir, if this is to be the construction of the clause, the conclusion is irresistible that Congress may assert and maintain original jurisdiction over all questions affecting the rights of the person and property of all private citizens within a State, and the State government may legislate upon this subject only by sufferance of Congress. It must be remembered that Judge Washington was interpreting the second section of the fourth article of the Constitution, and that neither he in 1820, nor any other judge before or since, has authorized so broad a construction of the power of Congress as that proposed by the gentlemen to whom I refer.

GUARANTEES OF LIFE, LIBERTY, AND PROPERTY.

The next clause of the section under debate declares:

"Nor shall any State deprive any person of life, liberty, or property, without due process of law."

This is copied from the fifth article of amendments, with this difference: as it stood in the fifth article it operated only as a restraint upon Congress, while here it is a direct restraint upon the governments of the States. The addition is very valuable. It realizes the full force and effect of the clause in Magna Charta, from which it was borrowed; and there is now no power in either the State or the national Government to deprive any person of those great fundamental rights on which all true freedom rests, the rights of life, liberty, and property, except by due process of law; that is, by an impartial trial according to the laws of the land. This very provision is in the constitution of every State in the Union; but it was most wise and prudent to place it in the serene firmament of the national Constitution, high above all the storms and tempests that may rage in any State.

EQUAL PROTECTION OF THE LAWS.

Mr. Speaker, I come now to consider the last clause of this first section, which is, as I believe, the chief and most valuable addition made to the Constitution in the section. That clause declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This thought was never before in the Constitution, either in form or in substance. It was neither expressed in any words in the instrument, nor could it be implied from any provision. It is a broad and comprehensive limitation on the power of the State governments, and, without doubt, Congress is empowered to enforce this limitation by any appropriate legislation. Taken in connection with the other clauses of this section, it restrains the States from making or enforcing laws which are not on their face and in their provisions of equal application to all the citizens of the State. It is not required that the laws of a State shall be perfect. They may be unwise, injudicious, even unjust; but they must be equal in their provisions, like the air of heaven, covering all and resting upon all with equal weight. The laws must not only be equal on their face, but they must be so administered that equal protection under them shall not be denied to any class of citizens, either by the courts or the executive officers of the State.

It may be pushing the meaning of the words beyond their natural limits, but I think the provision that the States shall not "deny the equal protection of the laws" implies that they shall afford equal protection.

Now, Mr. Speaker, to review briefly the ground traveled over: the changes wrought in the Constitution by the last three amendments in regard to the individual rights of citizens are these: that no person within the United States shall be made a slave; that no citizen shall be denied the right of suffrage because of his color or because he was once a slave; that no State, by its legislation or the enforcement thereof, shall abridge the privileges or immunities of citizens of the United States; that no State shall, without due process of law, disturb the life, liberty, or property of any person within its jurisdiction; and finally, that no State shall deny to any person within its jurisdiction the equal protection of the laws.

Thanks to the wisdom and patriotism of the American people, these great and beneficent provisions are now imperishable elements of the Constitution, and will, I trust, remain forever among the irreversible guarantees of liberty.

ENFORCEMENT OF THE AMENDMENTS.

How can these new guaranties be enforced? In the first place, it is within the power of Congress to provide, by law, that cases arising under the provisions of these amendments may be carried up on appeal from the State tribunals to the courts of the United States, where every law, ordinance usage, or decree of any State in conflict with these provisions may be declared unconstitutional and void. This great remedy covers nearly all the ground that needs to be covered in time of peace; and this ground has already been covered, to a great extent, by the legislation of Congress.

The civil rights act of 1866, as reënacted by the law of May 21, 1870, opens the courts of the United States to all who were lately slaves, and to all classes of persons who by any State law or custom are denied the equal rights and privileges of white men. By the stringent and sweeping act of May 21, 1870, known as the enforcement act, and by the supplementary act of February 28, 1871, Congress has provided the amplest protection of the ballot-box and of the right of voters to enjoy the suffrage as guaranticd to them in the main text of the Constitution and in the fifteenth amendment.

In the second place, it is undoubtedly within the power of Congress to provide by law for the punishment of all persons, official or private, who shall invade these rights, and who by violence, threats, or intimidation shall deprive any citizen of their fullest enjoyment. This is a part of that general power vested in Congress to punish the violaters of its laws.

Under this head I had supposed that the enforcement act of May 21, 1870, made ample provision. I quote the sixth section:

"SEC. 6. *And be it further enacted*, That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be

held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court—the fine not to exceed $5.000, and the imprisonment not to exceed ten years—and shall, moreover, be thereafter ineligible to and disabled from holding any office or place of honor, profit, or trust created by the Constitution or laws of the United States."

The sixteenth and seventeenth sections add still further safeguards for the protection of the people.

For the protection of all officers of the United States in the discharge of their duties, and for the enforcement of all the laws of the United States, our statutes make ample provisions. The President is empowered to use all the land and naval forces if necessary to execute these laws against all offenders.

But, sir, the President has informed us in his recent message, that in some portions of the Republic wrongs and outrages are now being perpetrated, under circumstances which lead him to doubt his power to suppress them by means of existing laws. That new situation confronts us. I deeply regret that we were not able to explore the length, breadth, and depth of this new danger before we undertook to provide a legislative remedy. The subject is so obscured by passion that it is hardly possible for Congress, with the materials now in our possession, to know the truth of the case, to understand fully the causes of this new trouble, and to provide wisely and intelligently the safest and most certain remedy.

But enough is known to demand some action on our part. To state the case in the most moderate terms, it appears that in some of the southern States there exists a wide-spread secret organization, whose members are bound together by solemn oaths to prevent certain classes of citizens of the United States from enjoying these new rights conferred upon them by the Constitution and laws; that they are putting into execution their design of preventing such citizens from enjoying the free right of the ballot-box and other privileges and immunities of citizens, and from enjoying the equal protection of the laws. Mr. Speaker, I have no doubt of the power of Congress to provide for meeting this new danger, and to do so without trenching upon those great and beneficent powers of local self-government lodged in the States and with the people. To reach this result is the demand of the hour upon the statesmanship of this country. This brings me to the consideration of the pending bill.

BILL TO ENFORCE THE FOURTEENTH AMENDMENT.

The first section provides, in substance, that any person who, under color of any State law, ordinance, or custom, shall deprive any person of any rights, privileges, or immunities secured by the Constitution, the offender shall be liable to an action at law, or other proper proceeding, for redress in the several district or circuit courts of the United States. This is a wise and salutary provision, and plainly within the power of Congress.

But the chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe the last clause of the first section empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection.

Now if the second section of the pending bill can be so amended that it shall clearly define this offense, as I have described it, and shall employ no terms which assert the power of Congress to take jurisdiction of the subject until such denial be clearly made, and shall not in any way assume the original jurisdiction of the rights of private persons and of property within the States—with these conditions clearly expressed in the section, I shall give it my hearty support. These limitations will not impair the efficiency of the section, but will remove the serious objections that are entertained by many gentlemen to the section as it now stands.

I have made these criticisms, not merely for the purpose of securing such an amendment to the section, but because I am unwilling that the interpretation which some gentlemen have given of the constitutional powers of Congress shall stand as the uncontradicted history of this legislation. Amendments have been prepared which will remove the difficulties to which I have alluded; and I trust that my colleague [Mr. SHELLABARGER] and his committee will themselves accept and offer these amendments. I am sure my colleague will understand that I share all his anxiety for the passage of a proper bill. It is against a dangerous and unwarranted interpretation of the recent amendments to the Constitution that I feel bound to enter my protest.

Mr. SHELLABARGER. Mr. Speaker, I know that my colleague [Mr. GARFIELD] is as sincerely convinced in regard to the proposition that he has been contending for as a man ever was. And I want, therefore, to have the benefit of his candid reply to a suggestion which I will now make, and which may take perhaps a minute or two to state.

I understand that the effect of what he says is, that as the first section of the fourteenth amendment to the Constitution is a negation upon the power of the States, and that as the fifth section of that amendment only authorizes Congress to enforce the provisions thereof, therefore Congress has no power by direct legislation to secure the privileges and immunities of citizenship, because the provision in each

section is in the form of a mere negation. Now, what I want to ask his attention to is this: first, he will recognize that by virtue of citizenship under the old Constitution there was no power in Congress to touch the question of the eleetive franehise; that was referred by the old Constitution to the clause which said that eleetors should be those who were electors for the most numerous branch of the State Legislature. Now, then, the fifteenth amendment was also a mere negation upon the powers of the States and of the United States, saying that no State nor the United States shall take away the right to vote on aecount of eolor, race, &e. That also is another negation. The old clause in the Constitution in regard to elections did not give Congress the power to toueh the question as to who should vote, but simply gave them power to regulate the time, place, and manner of casting the vote by those who eould vote under State authority. Now, I ask my colleague's attention to this. We have passed here an act which enforees the fifteenth amendment, whieh amendment was a mere negation also upon the power of the States. It is provided in the first seetion of that act that all eitizens of the United States shall have the right to go into the States from a mere negation, to say who shall vote at township and every other election. Then, under the fifteenth amendment, he goes directly to the citizen and punishes the man who deprives any one of the right to vote, which he gets under Federal law, and in contravention of the eonstitutions of one half of the States in the Union, as my learned eolleague said the other day. I push him now and demand that he shall push his logie to its eonsequences.

Mr. GARFIELD, of Ohio. If the case stands in all respects exactly as my eolleague puts it, it might push me to the conelusion that some of the provisions of the enforeement aet are unconstitutional; but I do not admit either the premises or the conclusions. My colleague very well remembers that many distinguished men in this House and in the Senate claimed that the right of suffrage was in the old Constitution without this fifteenth amendment.

Mr. SHELLABARGER. And many denied it.

Mr. GARFIELD, of Ohio. It makes no differenee who denied it; the fact is, that it has again and again been elaborately argued upon this floor that the clause in the main text whieh gives to Congress the power to regulate the time, place, and manner of holding eleetions carried with it the whole question of suffrage. I was never able to believe that this elause went so far; bnt I did believe, and I do now believe, that it goes so far that, with the fifteenth amendment superadded, Congress is armed with more than a mere negative power, and had the right to pass the enforcement law of May last.

But I eall my colleague's attention to the peculiar language of the fifteenth amendment. It is not, as his remarks imply, a mere prohibition to the State, a simple negation of power. It is a double prohibition, reaching, in terms, both the State and the United States. This is the language:

ARTICLE XV.

"SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"SEC. 2. The Congress shall have power to enforce this article by appropriate legislation."

This double prohibition Congress may enforce.

Now, Mr. Speaker, I call the attention of the House to the third seetion of the bill. I am not clear as to the intention of the committee, but if I understand the language correetly, this section proposes to punish citizens of the United States for violating State laws. If this be the meaning of the provision, then whenever any person violates a State law the United States may assume jurisdietion of his offense. This would virtually abolish the administration of justiee under State law. In so far as this section punishes persons who under color of any State law shall deny or refuse to others the equal protection of the laws. I give it my cheerful support; but when we provide by congressional enaetment to punish a mere violation of a State law, we pass the line of constitutional authority.

SUSPENSION OF THE PRIVILEGES OF HABEAS CORPUS.

But, Mr. Speaker, there is one provision in the fourth seetion which appears to me both unwise and unnecessary. It is proposed not only to authorize the suspension of the privileges of the writ of *habeas corpus*, but to authorize the declaration of martial law in the disturbed districts.

I do not deny, but I affirm the right of Congress to authorize the suspension of the privileges of the writ of *habeas corpus* whenever in eases of rebellion or invasion the public safety may require it. Sueh action has been and may again be neeessary to the safety of the Republic; but I eall the attention of the House to the faet that never but onee in the history of this Government has Congress suspended the great privileges of this writ, and then it was not done until after two years of war had closed all the ordinary tribunals of justiee in the rebellious distriets, and the great armies of the Union, extending from Maryland to the Mexican line, were engaged in a death-struggle with the armies of the rebellion. It was not until the 3d day of March, 1863, that the Congress of the United States found the situation so full of peril as to make it their duty to suspend this greatest privilege enjoyed by Anglo-Saxon people. Are we ready to say that an equal peril confronts us to day?

My objection to authorizing this suspension implies no distrust of the wisdom or patriotism of the President. I do not believe he would employ this power were we to confer it upon him; and if he did employ it, I do not doubt he would use it with justice and wisdom. But what we do on this occasion will be quoted as a precedent hereafter, when other men with other purposes may desire to confer this power on another President for purposes that may not aid in securing public liberty and public peace.

But this section provides no safeguard for citizens who may be arrested during the suspension of the writ. There is no limit to the time during which men may he held as prisoners. Nothing in the section requires them to be delivered over to the courts. Nothing in it gives them any other protection than the will of the commander who orders their arrest.

The law of March 3, 1863, provided that whenever the privileges of the writ were suspended all persons arrested, other than prisoners of war, should be brought before the grand jury of some district or circuit court of the United States, and if no indictment should be found against them they must, on the discharge of the grand jury, be immediately dis charged from arrest; and the officer who should detain any unindicted person beyond that limit was liable to fine and imprisonment.

Mr. SHELLABARGER. The bill refers it to the very law the gentleman cites; gives it to the operation of that law.

Mr. GARFIELD, of Ohio. My colleague is mistaken; the law of March 3, 1863, was a temporary act and expired with the rebellion. It is not contained in Brightly's Digest, and is no longer in force. Should the writ be suspended, I shall ask the House to reënact the second section of the law of 1863.

MARTIAL LAW.

But, sir, this fourth section goes a hundred bowshots further than any similar legislation of Congress during the wildest days of the rebellion. It authorizes the declaration of martial law. We are called upon to provide by law for the suspension of all law! Do gentlemen remember what martial law is? Refer to the digest of opinions of the Judge Advocate General of the United States, and you will find a terse definition which gleams like the flash of a sword-blade. The Judge Advocate says: "Martial law is the will of the general who commands the army." And Congress is here asked to declare martial law. Why, sir, it is the pride and boast of England that martial law has not existed in that country since the Petition of Right in the thirty-first year of Charles II. Three years ago the lord chief justice of England came down from the high court over which he was presiding to review the charge of another judge to a grand jury, and he there announced that the power to declare martial law no longer existed in England. In 1867, the same judge, in the case of The Queen *vs.* Nelson, uttered this sentence:

"There is no such law in existence as martial law, and no power in the Crown to proclaim it."

In a recent treatise entitled The Nation, a work of great power and research, the author, Mr. Mulford, says:

"The declaration of martial law, or the suspension of the *habeas corpus*, is the intermission of the ordinary course of law, and of the tribunals to which all appeal may be made. It places the locality included in its operations no longer under the government of law. It interrupts the process of rights and the procedure of courts and restricts the independence of civil administration. There is substituted for these the intention of the individual. To this there is in the civil order no formal limitation. In its immediate action it allows beyond itself no obligation and acknowledges no responsibility. Its command or its decree is the only law; its movement may be secret, and its decisions are open to the inquiry of no judge and the investigation of no tribunal. There is no positive power which may act, or be called upon to act, to stay its caprice or to check its arbitrary career since judgment and execution are in its own command, and the normal action and administration is suspended and the organized force of the whole is subordinate to it."—*Pages* 185-6.

The Supreme Court, in *ex parte* Milligan, (4 Wallace, 124) examined the doctrine that in time of war the commander of an armed force has power within the lines of the military district to suspend all civil rights, and subject citizens as well as soldiers to the rule of his will.

Mr. Justice Davis, who delivered the opinion of the court, said:

"If this position is sound to the extent claimed, then, when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons as he thinks right and proper, without fixed or certain rules.

"The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law established on such a basis destroys every guarantee of the Constitution, and effectually renders the "military independent of and superior to the civil power;" the attempt to do which by the king of Great Britain was deemed by our fathers such an offense that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish." * * * *

"Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."

* * * * * * * * * * *

"Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."

The court was unanimous in the decree which was made in this case, though four of the judges dissented from some of the opin-

ions expressed by the court. Yet these dissenting judges united in a declaration that martial law can only be authorized in time of war, and for the purpose of punishing crimes against the security and safety of the national forces. But no member of the court gave the least support to the proposition that martial law could be declared to punish citizens of the United States where the courts of the United States were open, and where war, by its flaming presence, has not made the administration of justice difficult or impossible. The Chief Justice, who delivered the dissenting opinion, and in which all the dissenting judges concurred, said:

"Martial law proper is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities, where ordinary law no longer adequately secures public safety and private rights.

"We think that the power of Congress, in such times and in such localities to authorize trial for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces."

I have quoted not only the opinion of the court, but that of the dissenting judges, for the purpose of exhibiting the unanimity of the court on the main questions relating to martial law. I cannot think that this House will, at this time, take such an extreme and unprecedented measure.

Sir, this provision means war, or it means nothing; and I ask this House whether we are now ready to take this step? Shall we "cry havoc and let slip the dogs of war?"

I have taken a humble part in one war, and I hope I shall always be ready to do any duty that the necessities of the country may require of me; but I am not willing to talk war or to declare war in advance of the terrible necessity. Are there no measures within our reach which may aid in preventing war? When a savage war lately threatened our western frontiers we sent out commissioners of peace in the hope of avoiding war. Have we done all in our power to avoid that which this section contemplates? I hope the committee will bring in a companion measure that looks toward peace and enable us to send the olive branch with the sword.

I hope this House will grant general amnesty to all except to those who held high official trust under the United States, and then breaking their oaths went into rebellion. We should enlist both the pride and the selfishness of the people on the side of good order and peace. But I remind gentlemen that we have not even an indication or suggestion from the President that such a remedy as martial law is needed; and yet we are called upon to authorize the suspension, not only of the great writ, but of all laws, and that, too, in advance of any actual necessity for it.

Mr. SHELLABARGER. My colleague will observe that the state of things under which alone martial law may be declared is particularly described in the bill.

Mr. GARFIELD, of Ohio. I know that the bill states the circumstances under which martial law may be declared; but why should we now alarm the country by this extreme measure?

Mr. SHELLABARGER. Because Congress may not be in session when the emergency arises.

Mr. GARFIELD, of Ohio. When neither the courts nor the President, with the Army and Navy to aid in enforcing the laws, can keep the peace, the President will be justified in calling Congress together. No stronger reason for convening Congress could arise than the necessity for martial law.

In conclusion, Mr. Speaker, I have only to say that, within the limits of our power, I will aid in doing all things that are necessary to enforce the laws of the United States, to protect and defend every officer of the Government in the free and full exercise of all his functions, and to secure to the humblest citizen the fullest enjoyment of all the privileges and immunities granted him by the Constitution, and to demand for him the equal protection of the laws.

All this can be done by this bill when amended as I have ventured to suggest.

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